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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1575

JOHN D. CALLAHAN, ALLAN L. KELLY, PAT J. METKE, FRANK A. MOORE, and JAMES W. WHITTAKER, each individually, and as a member of the STATE GAME COMMISSION OF THE STATE OF OREGON; JOHN McKEAN, individually, and as DIRECTOR OF THE OREGON GAME COMMISSION; and HOLLY HOLCOMB, individually, and as DIRECTOR OF THE OREGON STATE PATROL & OREGON GAME ENFORCEMENT DIVISION,

Petitioners,

vs.

CHARLES E. KIMBALL, STEPHEN L. LANG, ALLAN LANG, LEONARD O. NORRIS, JR., and JAMES KIRK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. .....

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this action on February 26, 1974.

OPINIONS BELOW

The opinion of the Ninth Circuit, — F 2d —, is printed in Appendix A, page 13. The opinion of the United States District Court for the District of Oregon is printed in Appendix B, page 24.

The opinions of the Court of Appeals for the State of Oregon, 97 Or Adv Sh 1533, 14 Or App 538, 513 P2d 813 (1973), reh. den. 14 Or App 538, 514 P2d 566 (1973), are printed in Appendix C, page 27. The opinion of the Circuit Court for the County of Klamath (unpublished) is printed in Appendix D, page 33.

JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was filed and entered on February 26, 1974 (Appendix A, page 13). This Court has jurisdiction under 28 USC § 1254 (1).

QUESTION PRESENTED

Do the withdrawn members of the Klamath Indian tribe, who sold their interest in their tribal property, have the right to hunt and fish within the former tribal reservation without complying with the fish and game laws of the State of Oregon?

A corollary question is whether the United States District Court had jurisdiction to entertain this suit.

TREATY AND STATUTE INVOLVED

The treaty involved is the Treaty of October 4, 1864, between the United States and the Klamath and Modoc Tribes and Yahooskin Band of Snake Indians, 16 Stat. 707, set forth in Appendix E, page 36.

The statute involved is 25 USC § 564a (c), which provides:

> "Members of the tribe who receive the money value of their interests in tribal property shall there-

upon cease to be members of the tribe: Provided, That nothing shall prevent them from sharing in the proceeds of tribal claims against the United States."

STATEMENT OF THE CASE

Respondents (plaintiffs-appellants below) are Klamath Indians by racial ancestry and claim rights under the treaty of October 14, 1964, 16 Stat. 707, which established the Klamath and Modoc reservation in Oregon. Pursuant to the Klamath Termination Act, 25 USC §§ 564-564x, plaintiffs, or their ancestors, elected to withdraw from the tribe and have their interest in tribal property converted into money and paid to them. 25 USC § 564d (2). In order to pay the withdrawing members of the tribe, part of the original tribal property was sold, the greater part being taken by the United States. It now forms a part of the Winema National Forest and the Klamath Forest National Wildlife Refuge. Plaintiffs seek a declaratory judgment declaring their right to hunt, trap and fish within the former Klamath Indian reservation free of Oregon fish and game regulations, pursuant to the treaty of October 14, 1864, supra. They also seek an injunction restraining defendants, officers of the State of Oregon, from applying and enforcing Oregon fish and game regulations against them within the boundaries of the former tribal reservation.

The District Court denied relief and dismissed plaintiff's complaint, reasoning that as withdrawn members of the Klamath tribe who received their allocable shares of tribal assets in cash, plaintiffs retained no right to

hunt and fish on the former tribal reservation. (Transcript of Proceedings, p. 36-37, Appendix F, page 46.) The Ninth Circuit reversed, and granted the declaratory relief sought by plaintiffs, holding that they felt compelled to make this decision by *Menominee Tribe vs. United States,* 391 US 404 (1968). (Appendix A, page 18).

Defendants' motion to dismiss in the District Court was also based upon the contention that the District Court lacked jurisdiction over the subject matter of this action under either 42 USC § 1983 or 28 USC § 1331. The District Court questioned jurisdiction, but decided the case on the ground that the complaint failed to state a claim upon which relief could be granted.

The Ninth Circuit ignored the question of jurisdiction under 42 USC § 1983, but did find that jurisdiction existed under 28 USC § 1331, holding that:

> "At any rate, we cannot say with 'a legal certainty' that the value of the matter in controversy is really less than the jurisdictional amount." *City of Inglewood v. City of Los Angeles,* 450 F 2d 948, 952 (9th Cir 1972). Appendix A, p. 15.

REASONS FOR GRANTING THE WRIT

The decision of the Ninth Circuit misinterprets the decision of this Court in *Menominee Tribe v. The United States,* 391 US 404 (1968), and is also in conflict with the decision of the Oregon Court of Appeals, *State v. Bojorcas,* 97 Or Adv Sh 1533, 14 Or App 538, 513 P2d 813, reh. den. 97 Or Adv Sh 1741, 14 Or App 538, 514

P2d 566 (1973). The Ninth Circuit stated the issue as follows:

> "Defendants argue that Menominee tribe is distinguishable because of significant differences between the Menominee and Klamath Termination Acts. True, unlike the Klamath Termination Act, the Menominee Act gave no option to the Menominee Indians to withdraw from the tribe and receive the money value of their interest in tribal property. Also, although title to the reservation changed hands in Menominee tribe, the Menominees continued to occupy the same land before and after the Termination Act. The disputed land in this case, on the other hand, is no longer legally occupied by the Klamaths.
>
> "While these are substantial points of distinction, we find nothing in the language of Menominee tribe to indicate its reasoning does not transcend these distinctions." Appendix A, page 21.

Petitioners contend that this reasoning ignores a substantial and significant distinction between the *Menominee* case and this case. In *Menominee*, the question was whether the Menominee Termination Act abrogated the hunting and fishing rights of the Menominee Indians granted by the Treaty of Wolf River in 1854, 10 Stat. 1064.

This Court concluded that the Menominee Termination Act did not submit the hunting and fishing rights of the Indians to state regulation and control. It based its decision in large part on Public Law 280, 67 Stat. 588, as amended, 18 USC § 1162, which provides in part that:

> "Nothing in this section . . . shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement or statute with respect to

hunting, trapping or fishing or the control, licensing, or regulation thereof."

This Court then held that Public Law 280 preserved treaty fishing and hunting rights even after termination:

"Public Law 280 must therefore be considered in pari materia with the Termination Act. The two acts read together mean to us that although federal supervision of the tribe was to cease and all tribal property was to be transferred to new hands, the hunting and fishing rights granted or preserved by the Wolf River Treaty of 1854 survived the Termination Act of 1954." 391 US 404, 411.

Petitioners contend that, even if this conclusion applies to the *remaining* members of the Klamath tribe, it should not apply to the *withdrawn* members of the tribe.

What makes this case different from *Menominee* is that here Respondents (plaintiffs below) not only withdrew from their tribe but also *sold* their interests in tribal lands, including the right to hunt and fish on such lands without observing State laws. Congress did not abrogate Respondents' rights; Respondents voluntarily relinquished their rights for money.

The Ninth Circuit held that:

"Since the Act provides that nothing in it shall abrogate any treaty fishing rights, we conclude that a Klamath Indian possessing such rights on the former reservation at the time of its enactment retains them even though he relinquishes his tribal membership . . . ."

Appendix A, page 22.

This analysis totally ignores the fact that the withdrawn members of the Klamath tribe *sold* their interests in their tribal lands, including their hunting and fishing

rights. The Ninth Circuit apparently bases this curious result on the theory that:

> "At the hearings on the Klamath Termination bill, Senator Watkins suggested that the Government 'buy out' the Indians' hunting and fishing rights rather than preserve them after termination. See Joint Hearings, Subcommittees of the Committees on Interior and Insular Affairs, 83rd Cong., 2d Sess., P. 4, on S. 2745 and H.R. 7320, pp. 254-55. Congress did not heed this suggestion, however." Appendix A, page 21, Note 9.

This statement applies to the hunting and fishing rights of the *remaining* members of the Klamath tribe, whose position is similar to that of the Menominee Indians in *Menominee Tribe,* supra. Neither Senator Watkins nor anyone alse foresaw that the *withdrawn* members of the tribe would seek proprietary rights on land they sold solely on the basis of their racial ancestry. Nor is that what this Court decided in *Menominee Tribe,* supra. On the contrary, this Court specifically refused to decide this issue, 391 US 404, 409, Note 10, noting that:

> "We believe it inappropriate, however, to resolve the question of who the beneficiaries of the hunting and fishing rights may be; and we *expressly reserve decision on it.*" (emphasis added).

The Ninth Circuit was certainly not "compelled" by *Menominee Tribe* to render the decision it did.

The Oregon Court of Appeals reached the opposite result in a companion case involving the rights of withdrawn members of the Klamath tribe to hunt on the remaining reservation lands as guests of enrolled members of the tribe, *State v. Bojorcas,* 97 Or Adv Sh 1533,

1536, 14 Or App 538, 513 P2d 813, reh. den. 97 Or Adv Sh 1741, 14 Or App 538, 514 P2d 566 (1973). The Oregon Court of Appeals reasoned:

> ". . . we are not dealing in this case with the rights of either the Klamath Tribe or its members, but rather with the rights of those persons who have chosen to withdraw from the tribe.
>
> "Section 564e (c) of the Klamath Termination Act provides:
>
> > 'Members of the tribe who receive the money value of their interests in tribal property shall thereupon cease to be members of the tribe: Provided, that nothing shall prevent them from sharing in the proceeds of tribal claims against the United States.'
>
> "We interpret this section to mean that members of the Klamath Tribe who elected to take cash payment for their interest in tribal property ceased to be members of the tribe insofar as the Federal Government is concerned, with the single statutory exception of sharing in proceeds of tribal claims against the United States. Such an interpretation is consistent with both the statement of legislative purpose quoted supra and § 564m (b) of the Termination Act which provides:
>
> > 'Nothing in sections 564 to 564w-1 of this title shall abrogate any fishing rights or privileges *of the tribe or the members thereof* enjoyed under Federal treaty. (Emphasis supplied.)'
>
> "Reading § 564e (c) and § 564b (b) of the Termination Act in pari materia, it is clear that the Termination Act provides for different treatment of tribe members and non-members.
>
> "To say that § 564e (c) terminates tribal membership for those persons receiving cash payments is not equivalent, as defendants suggest, to saying that the Klamath Tribe cannot control its own member-

ship for its own purposes. The tribe clearly retains that right. But when the issue becomes who shall be beneficiaries of federal treaties, Congress has the ultimate authority to determine tribal membership. See F. Cohen, Handbook of Federal Indian Law 98-100, and cases cited therein.

"Therefore, we conclude that whatever rights, if any, enrolled members of the Klamath and Modoc Tribes and Yahooskin Band of Snake Indians may retain to hunt on former reservation land, such rights do not extend to non-members, including defendants herein, and that defendants therefore enjoy no immunity from state game laws."

This view is entirely consistent with the holding of this Court in *Menominee Tribe*, supra. Moreover, with full knowledge of the Ninth Circuit's decision, the Oregon Court of Appeals, on March 13, 1974 (unpublished), denied a second motion for rehearing in *State v. Bojorcas*, supra.

The decision of the Ninth Circuit also leaves several practical problems unresolved.

If the decision of the Ninth Circuit were to be sustained, what exactly is the relief granted? This case came before the Ninth Circuit on Defendants' motion to dismiss. No injunction or declaratory judgment was granted by the District Court. No evidence was introduced to support the allegations of Plaintiffs' complaint. It is not merely premature but a clear violation of procedural due process for the Ninth Circuit to grant a declaratory judgment *sua sponte* with no evidence in the record to support Plaintiffs' claim for relief.

Again assuming that the decision of the Ninth Circuit is sustained, to whom does the privilege extend? Plaintiffs in the District Court were five individuals who did not purport to bring this case as a class action. Does the relief granted by the Ninth Circuit entitle the approximately 1,500 other withdrawn members of the Klamath tribe to bring individual actions against the State? Is the privilege subject to transfer by the laws of descent, or does it die with the individual?

Since the withdrawn members of the Klamath tribe are presumably not subject to regulation by tribal authorities, with whom does the State deal in enforcing those game laws which may be held to be subject to enforcement in those areas comprising the former Klamath Reservation?

The decision of the Ninth Circuit provides no guidance whatsoever to either petitioners or to the District Court in resolving these questions.

CONCLUSION

The petition for writ of certiorari should be granted to resolve the conflicting decisions of the Ninth Circuit and the Oregon Court of Appeals on this important question of the State of Oregon's ability to subject withdrawn members of the Klamath tribe to its fish and game laws.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES E. KIMBALL, STEPHEN L. LANG, ALLAN LANG, LEONARD O. NORRIS, JR., and JAMES KIRK
Plaintiffs-Appellants,

JOHN D. CALLAHAN, ALLAN L. KELLY, PAT J. METKE, FRANK A. MOORE, and JAMES W. WHITTAKER, each individually, and as a member of the STATE GAME COMMISSION OF THE STATE OF OREGON; JOHN McKEAN, individually, and as DIRECTOR OF THE OREGON GAME COMMISSION; and HOLLY HOLCOMB, individually, and as DIRECTOR OF THE OREGON STATE PATROL & OREGON GAME ENFORCEMENT DIVISION,
Defendants-Appellees.

No. 73-1512

OPINION

[February 26, 1974]

Appeal from the United States District Court
for the District of Oregon

Before: KOELSCH, WRIGHT and KILKENNY, Circuit Judges.

WRIGHT, Circuit Judge:

Plaintiffs-appellants are Klamath Indians by racial ancestry and claim rights under the Treaty of October 14, 1864, 16 Stat. 707, which established the Klamath and Modoc Reservation in Oregon. Pursuant to the Klamath Termination Act, 25 U.S.C. §§ 564-564x, plain-

tiffs or their ancestors elected to withdraw from the tribe and have their interest in tribal property converted into money and paid to them. 25 U.S.C. § 564d (2).[©] In order to pay the withdrawing members of the tribe, part of the original tribal property was sold, the greater part being taken by the United States. It now forms a part of the Winema National Forest and the Klamath Forest National Wildlife Refuge.

Plaintiffs seek a declaratory judgment declaring their right to hunt, trap, and fish within their ancestral Klamath Indian Reservation free of Oregon fish and game regulations, pursuant to the Treaty of October 14, 1864, *supra*. They also seek an injunction restraining defendants, officers of the State of Oregon, from applying and enforcing Oregon fish and game regulations against them within the boundaries of the old reservation.

The district court denied relief and dismissed the complaint for failure to state a claim upon which relief could be granted. We reverse and grant plaintiffs the declaratory relief they seek.

I

JURISDICTION

At the outset, we note that the defendants challenge the jurisdiction of this court and the district court over the subject matter of this action. The district court had jurisdiction if the matter in controversy exceeded the sum or value of $10,000, exclusive of interest and costs, and arose under the Constitution, laws, or treaties of the United States. 28 U.S.C. § 1331. We find jurisdiction. The matter in controversy is the right to be free from state regulations, and the value of this right is measured by the extent to which plaintiffs' treaty rights to hunt and fish would be impaired by state regulation. *Yoder v.*

[©] For a description of the termination process, *see* Klamath and Modoc Tribes v. United States, 436 F.2d 1008 (Ct. Cl.), *cert. denied*, 404 U.S. 950 (1971).

Assiniboine and Sioux Tribes of Fort Peck Indian Reservation, 339 F.2d 360, 363 (9th Cir. 1964).

More specifically, the amount in controversy is measured by determining the value to each plaintiff of the game and fish he would take if completely free of regulation, less the value of the limited amounts of game and fish he could take if regulated by the state.[6] Under similar circumstances this court has found jurisdiction under 28 U.S.C. § 1331, thereby implicitly finding a matter in controversy exceeding a value of $10,000. *Holcomb v. Confederated Tribes of the Umatilla Indian Reservation*, 382 F.2d 1013, 1014 n.4 (9th Cir. 1967); *see also Leech Lake Band of Chippewa Indians v. Herbst*, 334 F. Supp. 1001, 1002 (D. Minn. 1971). At any rate, we cannot say with "a legal certainty" that the value of the matter in controversy is really less than the jurisdictional amount. *City of Inglewood v. City of Los Angeles*, 451 F.2d 948, 952 (9th Cir. 1972).[6]

II

THE TREATY RIGHTS

The Treaty of October 14, 1864, 16 Stat. 707, described the boundaries of the Klamath and Modoc Reservation and stated that the described tract "shall, until otherwise directed by the President of the United States, be set apart as a residence for said Indians, [and] held and regarded as an Indian reservation. . . ." The treaty secured for the Indians "the exclusive right of taking fish in the streams and lakes included in said reservation. . . ." In 1956 the district court judicially interpreted this treaty also to provide the Indians with the exclusive right to hunt and trap on the reservation without state

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[6] We do not decide whether the damages to the individual plaintiffs can be aggregated to reach the sum of $10,000.

[6] Given jurisdiction under 28 U.S.C. § 1331, the district court had the power, under 28 U.S.C. § 2201, to render the declaratory relief sought by plaintiffs. This court has jurisdiction under 28 U.S.C. § 1291.

regulation or control. *Klamath & Modoc Tribes v. Maison*, 139 F. Supp. 634 (D. Ore. 1956).

Before deciding if these rights survive the Klamath Termination Act, we first consider whether the treaty was correctly interpreted to include hunting and trapping rights.[4]

In *Menominee Tribe v. United States*, 391 U.S. 404 (1968), the Supreme Court considered the Treaty of Wolf River of 1854, 10 Stat. 1064, which granted the Menominee Indians a reservation in Wisconsin. The treaty made no mention of hunting and fishing rights, but provided that the reservation was to be held by the Indians "for a home, to be held as Indian lands are held." The Court agreed with the Court of Claims that this language includes the right to hunt and fish. 391 U.S. at 406;[5] *Menominee Tribe v. United States*, 179 Ct. Cl 496, 503-04, 388 F.2d 998, 1002 (1967); *State v. Sanapaw*, 21 Wis.2d 377, 383, 124 N.W.2d 41, 44 (1963).

We find that the language "set apart as a residence for said Indians, [and] held and regarded as an Indian reservation" also includes those rights. The specific treaty provision reserving the Klamaths' exclusive right to fish could prompt the argument that their treaty excludes the right to hunt. However, in light of the highly

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[4] Defendants state that an earlier decision of this court overruled the district court's interpretation of the treaty to include hunting and trapping rights. This is incorrect. In Klamath and Modoc Tribes v. Maison, 338 F.2d 620 (9th Cir. 1964), we held, incorrectly in light of Menominee Tribe v. United States, 391 U.S. 404 (1968), that whatever treaty rights the Indians had on land transferred as a result of the Klamath Termination Act were lost. We did not find that the treaty failed to provide hunting and trapping rights. We held that if § 564m(b) of the Act provides fishing rights on the severed land, a question not before us at the time, the rights would be grounded in an express statutory grant rather than in the treaty. Section 564m(b) is discussed in part III of this opinion, *infra*.

[5] The Court noted that this language sums up in one phrase "the familiar provisions of earlier treaties which recognized hunting and fishing as normal incidents of Indian life." 391 U.S. at 406 n.2.

significant role that hunting and trapping played (and continue to play) in the lives of the Klamaths,[©] it seems unlikely that they would have knowingly relinquished these rights at the time they entered into the treaty. *See Menominee Tribe v. United States*, 391 U.S. at 406; *State v. Sanapaw, supra* at 383, 124 N.W.2d at 44. Moreover, they enjoyed the exclusive rights to hunt, trap, and fish for almost 100 years with the consent and acquiescence of the State of Oregon. *Klamath and Modoc Tribes v. Maison*, 139 F. Supp. 634, 637 (D. Ore. 1956). These facts, coupled with our duty to construe the treaty favorably to the Indians with whom it was made,[©] lead us to conclude that the treaty provides exclusive rights to hunt and trap, as well as fish, free of state regulation.

III

EFFECT OF THE KLAMATH TERMINATION ACT

In 1954 Congress passed the Klamath Termination Act, which became fully effective in 1961. 25 U.S.C. §§ 564-564x. The express purpose of this Act was to terminate federal supervision over the Klamath Tribe of Indians, to dispose of federally owned property acquired for the administration of Indian affairs, and to terminate the provision of federal services to the Indians solely because of their status as Indians.

Pursuant to the Klamath Termination Act, a final roll of all adult members of the tribe was prepared and published in 1956. 25 U.S.C. § 564b. Under the Act, each

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© *Klamath & Modoc Tribes v. Maison*, 139 F. Supp. 634 (D. Ore. 1956).

© The Supreme Court in *Menominee Tribe* reiterated its earlier statement in United States v. Winans, 198 U.S. 371, 380-81 (1905), that

> "[W]e will construe a treaty with the Indians as 'that unlettered people' understood it, and 'as justice and reason demand, in all cases where power is exerted by the strong over those to whom they owe care and protection,' and counterpoise the inequality 'by the superior justice which looks only to the substance of the light without regard to technical rules.' "

391 U.S. at 406 n.2; McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 174 (1973).

person whose name appeared on this tribal roll had to elect whether to withdraw from the tribe and receive the money value of his interest in tribal property or to remain in the tribe and participate in a non-governmental tribal management plan. The Act provides that "[m]embers of the tribe who receive the money value of their interests in tribal property shall thereupon cease to be members of the tribe. . . ." 25 U.S.C. § 564e (c).

On the final tribal roll were 2,133 persons. Of these, 1,660 elected to withdraw from the tribe and take their interests in cash. The remaining 473 elected to retain their interests in land and to participate in the land management plan. A part of tribal land proportionate to the number of remaining members was transferred to a private trustee to administer under the statutory management plan. The remainder was sold to pay the withdrawn members, and the majority of this portion is now United States national forest land.

Plaintiffs are five Klamath Indians who withdrew from the tribe. They claim that they nevertheless retain treaty rights to hunt, trap, and fish free of state regulation on the former Indian land that was sold to pay them for their shares in tribal property. Feeling compelled by *Menominee Tribe v. United States*, 391 U.S. 404 (1968), we agree.

The Menominee Termination Act [25 U.S.C. §§ 891-902] is similar in several respects to the Klamath Termination Act. Both provide basically for the termination of federal supervision over the property and members of the respective tribes. The Wisconsin Supreme Court held in *State v. Sanapaw*, 21 Wis.2d 377, 124 N.W.2d 41 (1963), that the hunting and fishing rights of the Menominee Indians were abrogated by Congress in the Menominee Termination Act. The tribe then brought suit against the United States in the Court of Claims to recover damages for the loss of those rights. *Menominee Tribe of Indians v. United States*, 388 F.2d 998 (Ct. Cl. 1967). That court awarded no damages, concluding that

the Termination Act did not abrogate the Indians' rights to hunt and fish. 388 F.2d at1005-06.

The Supreme Court affirmed the Court of Claims. *Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968). The Court noted that the effect of the Termination Act was that all federal supervision over the tribe and tribal property was to end and that "the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction." 25 U.S.C. § 899. The Court acknowledged that this language supports a forceful argument that the Termination Act submitted the hunting and fishing rights of the Indians to state regulation and control. The Court, however, reached the opposite conclusion. 391 U.S. at 410.

Its conclusion was based in large part on Public Law 280 [18 U.S.C. § 1162], passed at the same time as the Menominee and Klamath Termination Acts and which became effective seven years before the Termination Acts became fully effective. That law granted certain states jurisdiction "over offenses committed by or against Indians in the areas of Indian country" named in the Act, which in the case of Wisconsin was described as "All Indian country within the State," and in the case of Oregon, as "All Indian country within the State except the Warm Springs Reservation." But Public Law 280 provided further that "Nothing in this section . . . shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute *with respect to hunting, trapping, or fishing* or the control, licensing, or regulation thereof." (Emphasis added.)

The Supreme Court noted that, at the time Public Law 280 became effective in 1954, the Menominee Reservation had not been terminated and it was still "Indian country" within the meaning of the law. Similarly, the Klamath and Modoc Reservation in Oregon was still "Indian country." The Court held that Public Law 280

preserved treaty hunting and fishing rights even after termination. The Court's reasoning compels our conclusion in the present case.

> Public Law 280 must therefore be considered *in pari materia* with the Termination Act. The two Acts read together mean to us that although federal supervision of the tribe was to cease *and all tribal property was to be transferred to new hands,* the hunting and fishing rights granted or preserved by the Wolf River Treaty of 1954 survived the Termination Act of 1954. 391 U.S. at 411. [Emphasis added.]

The Court stated that this construction is in accord with the purpose of the Termination Act, which is only to terminate federal *supervision* over tribal property and members. Both the Menominee and the Klamath Termination Acts contain a provision rendering inapplicable "all statutes of the United States which affect Indians because of their status as Indians." 25 U.S.C. §§ 899 and 564q. The Court stated that this provision "plainly refers to the termination of federal supervision. The use of the word 'statutes' is potent evidence that no *treaty* was in mind." 391 U.S. at 412.

The Court emphasized that it would not "construe the Termination Act as a backhanded way of abrogating the hunting and fishing rights of these Indians." It stated that the intention to abrogate or modify a treaty is not to be lightly imputed to Congress, and it found it "difficult to believe that Congress, without explicit statement, would subject the United States to a claim for compensation by destroying property rights conferred by treaty . . . ." 391 U.S. at 412-13.

Defendants argue that *Menominee Tribe* is distinguishable because of significant differences between the Menominee and Klamath Termination Acts. True, unlike the Klamath Termination Act, the Menominee Act gave no option to the Menominee Indians to withdraw from the tribe and receive the money value of their in-

terests in tribal property.[8] Also, although title to the reservation changed hands in *Menominee Tribe*, the Menominees continued to occupy the same land before and after the Termination Act. The disputed land in this case, on the other hand, is no longer legally occupied by the Klamaths.

While these are substantial points of distinction, we find nothing in the language of *Menominee Tribe* to indicate its reasoning does not transcend these distinctions.[9]

Defendants also contend that the reasoning of an earlier decision of this court supports their position. In *Klamath and Modoc Tribes v. Maison*, 338 F.2d 620 (9th Cir. 1964), certain members of the Klamath tribe, none of whom had elected to convert his tribal interest into money, sought a declaration of their right to hunt and trap, free from Oregon regulation and control, in an area that had formed part of their reservation prior to the Klamath Termination Act. This Court refused to grant such relief and held that, as a result of the Termination Act, no treaty rights attach to land severed from the former reservation. We acknowledge that the Termination Act does not expressly deal with any treaty rights respecting hunting and trapping. We held, however, that the treaty rights are limited to the lands of the reservation and that the Act, by effectively reducing the size of

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[8] The Menominee Termination Act did, however, provide for the payment of $1,500 to each member of the tribe on the final tribal roll. 25 U.S.C. § 894.

[9] Indeed, the reasoning the *Menominee Tribe* may be even more compelling in this case. At the hearings on the Klamath Termination bill, Senator Watkins suggested that the Government "buy out" the Indians' hunting and fishing rights rather than preserve them after termination. See Joint Hearings, Subcommittees of the Committees on Interior and Insular Affairs, 83d Cong., 2d Sess., Pt. 4, on S. 2745 and H.R. 7320, pp. 254-55. Congress did not heed this suggestion, however.

The Klamath Termination Act provides that withdrawn members of the tribe relinquish their interests in tribal property. 25 U.S.C. § 564e (c). Treaty rights to hunt and fish are, however, rights of the individual Indians. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 181 (1973); Mason v. Sams, 5 F.2d 255, 258 (W.D. Wash 1925).

the reservation, "most certainly reduced the area to which those rights attach." 338 F.2d at 623.

This reasoning cannot stand in light of *Menominee Tribe*. It is inconsistent with the Supreme Court's requirement that Congress clearly indicate when it intends to abrogate treaty rights. Moreover, it is inconsistent with the Court's construction of Public Law 280 that treaty rights with respect to hunting, trapping, or fishing survive the Termination Acts to the extent that they attach to land known as "Indian country" at the time Public Law 280 became effective.

Congress not only failed to indicate clearly an intent to abrogate treaty rights; it in fact expressly preserved at least fishing rights on the former reservation. The Termination Act provides that "[n]othing [in the Act] shall abrogate any fishing rights or privileges of the tribe or the members thereof enjoyed under Federal treaty." 25 U.S.C. § 564m(b). This court in *Klamath and Modoc Tribes v. Maison*, 338 F.2d 620 (9th Cir. 1964), stated that if this provision does provide fishing rights on the entire former reservation, a question not before us at the time, it did so by an express statutory grant since the treaty rights themselves could only extend to the now shrunken reservation. Defendants in this case offer a different interpretation and suggest that § 564m(b) does not aid plaintiffs since it applies to "the tribe or the members thereof" and plaintiffs are no longer "members" of the tribe.

Neither of the constructions withstands analysis. Since the Act provides that nothing in it shall abrogate any treaty fishing rights, we conclude that a Klamath Indian possessing such rights on the former reservation at the time of its enactment retains them even though he relinquishes his tribal membership or the reservation shrinks pursuant to the Act. Otherwise, the Act would in fact have resulted in the abrogation of treaty rights.

One final consideration this court must make concerns the extent of plaintiffs' rights that we here hold

survive the Termination Act. Plaintiffs seek no rights against private landowners, acknowledging that those persons might properly exclude Klamaths and anyone else from hunting and fishing if they so desire,[9] Plaintiffs do, however, seek a declaration, and we so hold, that they may exercise their treaty hunting, trapping, and fishing rights free of state fish and game regulations on the lands constituting their ancestral Klamath Indian Reservation, including that land now constituting United States national forest land and that privately owned land on which hunting, trapping, or fishing is permitted.[10]

Accordingly the judgment of the district court is REVERSED.

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[9] We make no holding and intimate no opinion on the treaty rights of the Indians vis-a-vis the private Oregon landowners.

[10] Plaintiffs do not seek *exclusive* rights to hunt, trap, and fish on land transferred pursuant to the Termination Act.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

CHARLES E. KIMBALL, STEPHEN L. LANG, ALLAN LANG, LEONARD O. NORRIS, JR., and JAMES KIRK, Plaintiffs, vs. JOHN D. CALLAHAN, ALLAN L. KELLY, PAT J. METKE, FRANK A. MOORE, and JAMES W. WHITTAKER, each individually, and as a member of the STAT GAME COMMISSION OF THE STATE OF OREGON; JOHN McKEAN, individually, and as DIRECTOR OF THE OREGON GAME COMMISSION; and HOLLY HOLCOMB, individually, and as DIRECTOR OF THE OREGON STATE PATROL & OREGON GAME ENFORCEMENT DIVISION, Defendants.	Civil No. 73-155 ORDER

Defendants moved to dismiss this action on the ground that plaintiffs failed to state a claim upon which relief can be granted.

The motion is allowed.

Dated this 15th day of March, 1973.

Gus J. Solomon
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

CHARLES E. KIMBALL, STEPHEN L. LANG, ALLAN LANG, LEONARD O. NORRIS, JR., and JAMES KIRK,

Plaintiffs,

vs.

JOHN D. CALLAHAN, ALLAN L. KELLY, PAT J. METKE, FRANK A. MOORE, and JAMES W. WHITTAKER, each individually, and as a member of the STAT GAME COMMISSION OF THE STATE OF OREGON; JOHN McKEAN, individually, and as DIRECTOR OF THE OREGON GAME COMMISSION; and HOLLY HOLCOMB, individually, and as DIRECTOR OF THE OREGON STATE PATROL & OREGON GAME ENFORCEMENT DIVISION,

Defendants.

Civil No. 73-155

MEMORANDUM OPINION

March 15, 1973

At the conclusion of the oral argument, I said that I questioned the jurisdiction of this Court in this case—first, on the issue of whether 42 U.S.C. § 1983 is applicable, and, second, whether as a matter of law it appears that each plaintiff has or can suffer $10,000 in damages if jurisdiction is based on 28 U.S.C. § 1331.

However, I do not decide this case on a jurisdictional ground because I believe that plaintiffs have failed to state a claim upon which relief can be granted. The plaintiffs are withdrawn members of the Klamath Tribe. Pursuant to the provisions of the Termination Act, they have received their allocable shares of the assets of the

Tribe in cash. They now assert that notwithstanding the receipt of this money, they still have fishing and hunting rights on the lands of their original ancestral tribal reservation.

At oral argument plaintiffs conceded that if their theory is right, the withdrawn Indians would have the privilege of fishing and hunting on land sold to private individuals. If, for example, Safeway Stores or U. S. Steel Corporation constructed buildings on the premises, the withdrawn members could still fish and hunt on that land. This would have the effect of reducing the value of all the remaining land belonging to fellow tribesmen who did not withdraw.

I do not believe that any of the cases cited support the plaintiffs' theory. I do not discuss them here because I know that both counsel for plaintiffs and the Attorney General can competently present their legal arguments to the appellate courts. I make this statement in order to inform the parties and the appellate courts the basis for my decision to grant defendants' motion to dismiss on the ground that plaintiffs failed to state a claim upon which relief can be granted.

Dated this 15th day of March, 1973.

Gus J. Solomon
United States District Judge

APPENDIX C

No. 1,836—September 4, 1973

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON, *Respondent, v.* ROBERT VERNON BOJORCAS (No. 72-111), *Appellant.*

STATE OF OREGON, *Respondent, v.* FLOYD BUD PARAZOO (No. 72-112), *Appellant.*

STATE OF OREGON, *Respondent, v.* ALLEN KEITH NELSON (No. 72-110), *Appellant.*

STATE OF OREGON, *Respondent, v.* ROBERT ALLEN HICKS (No. 72-113), *Appellant.*

Appeal from Circuit Court, Klamath County.

Donald A. W. Piper, Judge.

Argued and submitted June 20, 1973.

Daniel H. Israel, Native American Rights Fund, Boulder, Colorado, argued the cause for appellants. With him on the briefs were L. A. Aschenbrenner and Marmaduke, Aschenbrenner, Merten & Saltveit, Portland; and Hal F. Coe, Klamath Falls.

John W. Osburn, Solicitor General, Salem, argued the cause for respondent. With him on the briefs was Lee Johnson, Attorney General, Salem.

Before Schwab, Chief Judge, and Foley and Thornton, Judges.

Affirmed.

FOLEY, J.

Defendants were charged with the crime of illegal possession of deer in violation of ORS 498.030. The parties stipulated (1) that defendants were "withdrawn members" of the Klamath Tribe of Indians and (2) that they were in possession of deer which they had killed on

former reservation land, as charged in the complaint. Defendants were convicted and fined and have appealed their convictions, contending that they have certain treaty rights which exempt them from state game laws.

It is necessary to review briefly the history of the relationship between the Klamath Tribe of Indians and the United States Government in order to gain a perspective on the present controversy. The treaty between the United States and the Klamath and Modoc Tribes and Yahooskin Band of Snake Indians was concluded on October 14, 1864, and proclaimed on February 17, 1870. 16 Stat 707. That treaty guaranteed to the Indian tribes, among other things, "* * * the exclusive right of taking fish in the streams and lakes, included in said reservation, and of gathering edible roots, seeds, and berries within its limits * * *" and that language has been interpreted to include the right to hunt and trap on the reservation free from state regulation. *Klamath & Modoc Tribes, Etc. v. Maison,* 139 F Supp 634 (D Or 1956).

In 1961 the Klamath Termination Act, 25 USC §§ 564-564w became effective. The purpose of the Termination Act, as set forth in § 564, is to provide for

> "* * * the termination of Federal supervision over the trust and restricted property of the Klamath Tribe of Indians consisting of the Klamath and Modoc Tribes and the Yahooskin Band of Snake Indians, and of the individual members thereof, for the disposition of federally owned property acquired or withdrawn for the administration of the affairs of said Indians, and for a termination of Federal services furnished such Indians because of their status as Indians."

In order to accomplish this end, a procedure was established by which each member of the tribe was given an opportunity to elect to withdraw from the tribe and have his interest in tribal property converted into money and paid to him, or to remain in the tribe and participate n a tribal management plan prepared pursuant to the Act. 25 USC § 564d (a)(2). Four hundred seventy three

members of the tribe elected to remain in the tribe and their proportionate share of tribal property was transferred to a bank as trustee for the remaining members. One thousand six hundred sixty members of the tribe, on the other hand, elected to withdraw from the tribe and they received cash payments for their shares of tribal property. *See Klamath and Modoc Tribes v. Maison,* 338 F2d 620 (9th Cir 1964). Defendants in the cases at bar were among this latter group which elected to withdraw.

The Ninth Circuit Court of Appeals has held that the Klamath Termination Act terminated the tribe's hunting and trapping rights even though the Termination Act did not expressly mention those rights. *Klamath and Modoc Tribes v. Maison,* 338 F2d 620 (9th Cir 1964). Defendants argue that this holding has been effectively overruled by *Menominee Tribe v. United States,* 391 US 404, 88 S Ct 1705, 20 L Ed 2d 697 (1968), which held in a somewhat similar situation that tribal hunting and fishing rights guaranteed by treaty may be abrogated only by explicit legislation. Whatever may be the merits of that contention,[©] we do not reach it because we are not dealing in this case with the rights of either the Klamath Tribe or its members, but rather with the rights of those persons who have chosen to withdraw from the tribe.

Section 564e (c) of the Klamath Termination Act provides:

> "Members of the tribe who receive the money value of their interests in tribal property shall thereupon cease to be members of the tribe: *Provided,* That nothing shall prevent them from sharing in the proceeds of tribal claims against the United States."

We interpret this section to mean that members of the Klamath Tribe who elected to take cash payment for their interest in tribal property ceased to be members

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© We note that although the *Menominee Tribe* court was aware of the provisions of the Klamath Termination Act, *see* 391 US 404, 413, n 15, and 416, n 7, it did not mention the Ninth Circuit decision.

of the tribe insofar as the Federal Government is concerned, with the single statutory exception of sharing in proceeds of tribal claims against the United States.[9] Such an interpretation is consistent with both the statement of legislative purpose quoted supra and § 564m (b) of the Termination Act which provides:

> "Nothing in sections 564 to 564w-1 of this title shall abrogate any fishing rights or privileges *of the tribe or the members thereof* enjoyed under Federal treaty." (Emphasis supplied.)

Reading § 564e (c) and § 564m (b) of the Termination Act *in pari materia*, it is clear that the Termination Act provides for different treatment of tribe members and non-members.

To say that § 564e (c) terminates tribal membership for those persons receiving cash payments is not equivalent, as defendants suggest, to saying that the Klamath Tribe cannot control its own membership for its own purposes. The tribe clearly retains that right. But when the issue becomes who shall be beneficiaries of federal treaties, Congress has the ultimate authority to determine tribal membership. *See* F. Cohen, Handbook of Federal Indian Law 98-100, and cases cited therein.

Therefore, we conclude that whatever rights, if any, enrolled members of the Klamath and Modoc Tribes and Yahooskin Band of Snake Indians may retain to hunt on former reservation land, such rights do not extend to non-members, including defendants herein, and that defendants therefore enjoy no immunity from state game laws.

Affirmed.

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[9] The same conclusion was recently reached by the Oregon Federal District Court in Kimball v. Callahan, No. 73-155 (decided March 15, 1973).

No. 1863—September 28, 1973

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON, *Respondent*, *v.* ROBERT VERNON BOJORCAS (No. 72-111), *Appellant.*

STATE OF OREGON, *Respondent*, *v.* FLOYD BUD PARAZOO (No. 72-112), *Appellant.*

STATE OF OREGON, *Respondent*, *v.* ALLEN KEITH NELSON (No. 72-110), *Appellant.*

STATE OF OREGON, *Respondent*, *v.* ROBERT ALLEN HICKS (No. 72-113), *Appellant.*

Appeal from Circuit Court, Klamath County.

Donald A. W. Piper, Judge.

On appellant's petition for rehearing filed September 13, 1973. Affirmed September 4, 1973, 97 Adv Sh 1533, — Or App —, — P2d —.

Daniel H. Israel, Native American Rights Fund, Boulder, Colorado, for petition.

No appearance contra.

Before Schwab, Chief Judge, and Foley and Thornton, Judges.

Rehearing denied.

FOLEY, J.

Defendants contend in their petition for rehearing that this court should nave ruled explicitly on their argument that the stipulation upon which they were convicted was insufficient to support the convictions, since it did not negate the possibility that defendants were hunting upon the trust land wth the permission of the remaining tribal members. That argument is based on the premise that the remaining tribal members retain hunting rights,

and that their rights are assignable to persons who are not members of the tribe. The premise is erroneous.

As we noted in our prior opinion, the Ninth Circuit Court of Appeals has held that the remaining tribal members no longer have hunting and trapping rights on the former reservation land. *Klamath and Modoc Tribes v. Maison*, 338 F2d 620 (9th Cir 1964). On a matter of federal law, we feel that federal court opinions are entitled to considerable weight, and we therefore follow the Ninth Circuit holding. Since the remaining members of the Klamath Tribe retained no rights to hunt and trap themselves, they clearly had no such rights to assign.

Defendants argue that the Ninth Circuit opinion has been impliedly overruled by the United States Supreme Court's opinion in *Menominee Tribe v. United States*, 391 US 404, 88 S Ct 1705, 20 L Ed 2d 697 (1968), but both the treaty and the termination act involved in that case contained significantly different terms from those involved in the case at bar. In addition, as we noted in our prior opinion, the Supreme Court expressed no disapproval of the reasoning underlying the Ninth Circuit decision, despite the fact that it was aware of the terms of the Klamath Termination Act.

Petition for rehearing denied.

APPENDIX D

MEMORANDUM OPINION AND VERDICT OF THE CIRCUIT COURT FOR KLAMATH COUNTY, OREGON

The above cases came on for trial, consolidated by stipulation, for determination on the merits on agreed facts and the legal issue arising from the contention of defendants that the State Courts have no jurisdiction over the defendants or over the subject matter of the action; plaintiff appearing by Donald R. Crane, District Attorney for Klamath County; defendants appearing by Hal F. Coe, their attorney; and the Court having considered the stipulated facts, the arguments of counsel, the briefs and authorities, and now being fully advised in the premises, makes and files the following Memorandum Opinion and Verdict:

Defendants, who are withdrawn members of the Klamath Tribes, assert that notwithstanding the Klamath Termination Act and the manner in which it was carried out, the State of Oregon has no right to prosecute them for possession of untagged deer which they had killed on the lands beneficially owned by the remaining members of the Klamath Indian Tribe. In their brief they claim this immunity, under the Treaty of 1864 coupled with the contention that they have not been compensated for such a loss of their treaty rights and hence must continue to possess them.

The United States District Court for the District of Oregon reached the conclusion that, "withdrawing members have no rights, privileges or immunities to hunt or trap upon the tribal lands originally in the Klamath Indian Reservation." *Klamath and Modoc Tribes and Yahooskin Band of Snake Indians of the Klamath Reservation, et al, vs. H. G. Maison, individually and as Superintendent, Department of State Police, State of Oregon, et al,* Civil No. 8081—December 10, 1963. It is apparent from the findings of fact and conclusions of law that the Court reached such a determination because: (a) The

source of any such hunting and trapping rights is the treaty of October 14, 1864, (16 Stat. 707) between the United States of America and the Klamath and Modoc Tribes and the Yahooskin Band of Snake Indians, which states "and the exclusive right of taking fish in the streams and lakes, included in said reservation, and of gathering edible roots, seeds and berries within its limits, is hereby secured to the Indians aforesaid"; (b) The Klamath and Modoc Tribes and Yahooskin Band of Snake Indians continue to constitute a tribe whose membership is composed of remaining members whose names appear on the roll certified March 3, 1954, as remaining members, and (c) If the hunting and trapping rights of the remaining members are exclusive under the treaty, then all persons who are non-members of the Klamath Tribes are excluded, and among such excluded persons are withdrawn members.

The United States Court of Appeals, 9th Circuit, in affirming the Federal District Court, but holding the judgment in the case not to be binding on withdrawn members because they were not parties to the case, (338 F2d 620) nonetheless made the following observation:

"The United States appearing amicus curiae through the Attorney General, has expressed its view as follows:

'The Klamath Termination Act and many other termination acts of the 1950's and 1960's conclusively show that Congress now desires the Indians to be amalgamated with the rest of our population and not to be specially treated 'because of their status as Indians' * * * The purpose of the Klamath Termination Act to (a) end special status as Indians, and (c) make state laws applicable to them in the same manner as they apply to other citizens 'are express and unequivocal in the terms of the Act.'

"We are in agreement with this position." (Emphasis supplied.)

Considering a contention that Section 564m of the Klamath Termination Act operates to preserve hunting

and trapping rights on the lands of the former reservation, the Court of Appeals held:

"With complete awareness of the Indians' claims to hunting and trapping rights Congress has seen fit to limit the application of this section to fishing alone and must be presumed to have intended the section to be thus limited."

This Court concludes that defendants, by reason of their election to withdraw from the Klamath Tribes, no longer have immunity from prosecution and conviction of this charge of unlawful possession of deer, whatever may be the validity of their contention that they haven't been compensated for the loss of such a right.

Menominee Tribe, etc. vs. United States; 391 U.S. 404, 20 L.Ed. 2d 697, 88 S.Ct. 1705, reached a different result, but is distinguishable from this case because the Menominee Termination Act had no provision comparable to Section 564m of the Klamath Termination Act which has been construed by a United States Court of Appeals as above noted. Public Law 280, which was a factor in the result of the Menominee case does not operate to preserve hunting rights to these defendants because the Klamath Termination Act expressly provides: (section 564q (a)) "Upon removal of Federal restrictions . . . . except as otherwise provided in Sections 564-564w of this title, all statutes of the United States which affect Indians because of their status as Indians, shall no longer be applicable to the members of the tribe." Public Law 280 is such a law. (See the dissenting opinion of Justice Potter Stewart in the Menominee case.)

Accordingly, it is ORDERED AND ADJUDGED that the defendants, and each of them, is Guilty of Unlawful Possession of a Deer.

Dated this 16th day of January, 1973.

s/ Donald A. W. Piper
Circuit Judge"

APPENDIX E

Treaty between the United States of America and the Klamath and Modoc Tribes and Yahooskin Band of Snake Indians: Concluded, October 14, 1864; Ratification advised, with Amendments, July 2, 1866; Amendments assented to, December 10, 1869; Proclaimed, February 17, 1870.

ULYSSES S. GRANT,

President of the United States of America,

To all and singular to whom these presents shall come, greeting:

WHEREAS a treaty was made and concluded at Klamath lake, in the State of Oregon, on the fourteenth day of October, in the year of our Lord one thousand eight hundred and sixty-four, by and between J. W. Perit Huntington and William Logan, commissioners on the part of the United States, and La-Lake, Chil-o-que-nas, and other chiefs and headmen of the Klamath tribe of Indians; Schon-chin, Stak-it-ut, and other chiefs and headmen of the Moadoc tribe of Indians, and Kile-to-ak and Sky-te-ock-et, chiefs and headmen of the Yahooskin band of Snake Indians, respectively, on the part of said tribes and band of Indians, and duly authorized thereto by them, which treaty is in the words and figures following, to wit:

Articles of agreement and convention made and concluded at Klamath lake, Oregon, on the fourteenth day of October, A. D. one thousand eight hundred and sixty-four, by J. W. Perit Huntington, superintendent of Indian affairs in Oregon, and William Logan, United States Indian agent for Oregon, on the part of the United States, and the chiefs and headmen of the Klamath and Moadoc tribes, and Yahooskin band of Snake Indians, hereinafter named, to wit: La-Lake,

Chil-o-que-nas, Kellogue, Mo-ghen-kas-kit, Blow, Le-lu, Palmer, Jack, Kue-as, Poo-sak-sult, Che-mult, Na-ak-sum, Mooch-kat-allick, Toon-tuck-te, Boos-ki-you, Ski-a-tic, Shol-las loos, Ta-tet-pas, Muk-has, Her-man-koos-man, chiefs and headmen of the Klamaths, Schon-chin, Stak-it-ut, Keint-poos, Chuck-e-i-ox, chiefs and headmen of the Moadocs, and Kile-to-ak and Sky-te-ock-et, chiefs of the Yahooskin band of Snakes.

ARTICLE I. The tribes of Indians aforesaid cede to the United States all their right, title, and claim to all the country claimed by them, the same being determined by the folllowing boundaries, to wit: Beginning at the point where the forty-fourth parallel of north latitude crosses the summit of the Cascade mountains; thence following the main dividing ridge of said mountains in a southerly direction to the ridge which separates the waters of Pitt and McCloud rivers from the waters on the north; thence along said dividing ridge in an easterly direction to the southern end of Goose lake; thence northeasterly to the northern end of Harney lake; thence due north to the forty-fourth parallel of north latitude; thence west to the place of beginning: *Provided*, That the following described tract, within the country ceded by this treaty, shall, until otherwise directed by the President of the United States, be set apart as a residence for said Indians, [and] held and regarded as an Indian reservation, to wit: Beginning upon the eastern shore of the middle Klamath lake, at the Point of Rocks, about twelve miles below the mouth of Williamson's river; thence following up said eastern shore to the mouth of Wood river; thence up Wood river to a point one mile north of the bridge at Fort Klamath; thence due east to the summit of the ridge which divides the upper and middle Klamath lakes; thence along said ridge to a point due east of the north end of the upper lake; thence due east, passing the said north end of the upper lake, to the summit of the mountains on the east side of the lake; thence along said mountain to the point where Sprague's river is intersected by the Ish-tish-ea-wax creek; thence in a south-

erly direction to the summit of the mountain, the extremity of which forms the Point of Rocks; thence along said mountain to the place of beginning. And the tribes aforesaid agree and bind themselves that, immediately after the ratification of this treaty, they will remove to said reservation and remain thereon, unless temporary leave of absence be granted to them by the superintendent or agent having charge of the tribes.

It is further stipulated and agreed that no white person shall be permitted to locate or remain upon the reservation, except the Indian superintendent and agent, employes of the Indian department, and officers of the army of the United States, *guaranteed* [and] that in case persons other than those specified are found upon the reservation, they shall be immediately expelled therefrom; and the exclusive right of taking fish in the streams and lakes, included in said reservation, and of gathering edible roots, seeds, and berries within its limits, is hereby securd to the Indians aforesaid: *Provided, also,* That the right of way for public roads and railroads across said reservation is *guaranteed* [reserved] to citizens of the United States.

ARTICLE II. In consideration of and in payment for the country ceded by this treaty, the United States agree to pay to the tribes conveying the same the several sums of money hereinafter enumerated, to wit: Eight thousand dollars per annum for a period of five years, commencing on the first day of October, eighteen hundred and sixty-five, or as soon thereafter as this treaty may be ratified; five thousand dollars per annum for the term of five years next succeeding the first period of five years; and three thousand dollars per annum for the term of five years next succeeding the second period; all of which several sums shall be applied to the use and benefit of said Indians by the superintendent or agent having charge of the tribes, under the direction of the President of the United States, who shall, from time to time, in his discretion, determine for what objects the same shall be expended, so as to carry out the design of the expendi-

ture, [it] being to promote the well-being of the Indians, *advance them in civilization, and especially agriculture,* and to secure their moral improvement and education.

ARTICLE III. The United States agree to pay said Indians the additional sum of thirty-five thousand dollars, a portion whereof shall be used to pay for such articles as may be advanced to them at the time of signing this treaty, and the remainder shall be applied to subsisting the Indians during the first year after their removal to the reservation, the purchase of teams, farming implements, tools, seeds, clothing, and provisions, and for the payment of the necessary employes.

ARTICLE IV. The United States further agree that there shall be erected at suitable points on the reservation, as soon as practicable after the ratification of this treaty, one saw-mill, one flouring mill, suitable buildings for the use of the blacksmith, carpenter, and wagon and plough maker, the necessary buildings for one manual-labor school, and such hospital buildings as may be necessary, which buildings shall be kept in repair at the expense of the United States for the term of twenty years; and it is further stipulated that the necessary tools and material for the saw-mill, flour-mill, carpenter, blacksmith, and wagon and plough maker's shops, and books and stationery for the manual-labor school, shall be furnished by the United States for the period of twenty years.

ARTICLE V. The United States further engage to furnish and pay for the services and subsistence, for the term of fifteen years, of one superintendent of farming operations, one farmer, one blacksmith, one sawyer, one carpenter, and one wagon and plough maker, and for the term of twenty years of one physician, one miller, and two school-teachers.

ARTICLE VI. The United States may, in their discretion, cause a part or the whole of the reservation provided for in Article I. to be surveyed into tracts and as-

signed to members of the tribes of Indians, parties to this treaty, or such of them as may appear likely to be benefited by the same, under the following restrictions and limitations, to wit: To each head of a family shall be assigned and granted a tract of not less than forty nor more than one hundred and twenty acres, according to the number of persons in such family; and to each single man above the age of twenty-one years a tract not exceeding forty acres. The Indians to whom these tracts are granted are guaranteed the perpetual possession and use of the tracts thus granted and of the improvements which may be placed thereon; but no Indian shall have the right to alienate or convey any such tract to any person whatsoever, and the same shall be forever exempt from levy, sale, or forfeiture: *Provided*, That the Congress of the United States may hereafter abolish these restrictions and permit the sale of the lands so assigned, if the prosperity of the Indians will be advanced thereby: *And provided further*, If any Indian, to whom an assignment of land has been made, shall refuse to reside upon the tract so assigned for a period of two years, his right to the same shall be deemed forfeited.

ARTICLE VII. The President of the United States is empowered to declare such rules and regulations as will secure to the family, in case of the death of the head thereof, the use and possession of the tract assigned to him, with the improvements thereon.

ARTICLE VIII. The annuities of the tribes mentioned in this treaty shall not be held liable or taken to pay the debts of individuals.

ARTICLE IX. The several tribes of Indians, parties to this treaty, acknowledge their dependence upon the government of the United States, and agree to be friendly with all citizens thereof, and to commit no depredations upon the person or property of said citizens, and to refrain from carrying on any war upon other Indian tribes; and they further agree that they will not communicate with or assist any persons or nation hostile to the United

States, and, further, that they will submit to and obey all laws and regulations which the United States may prescribe for their government and conduct.

ARTICLE X. It is hereby provided that if any member of these tribes shall drink any spirituous liquor, or bring any such liquor upon the reservation, his or her proportion of the benefits of this treaty may be withheld for such time as the President of the United States may direct.

ARTICLE XI. It is agreed between the contracting parties that if the United States, at any future time, may desire to locate other tribes upon the reservation provided for in this treaty, no objection shall be made thereto; but the tribes, parties to this treaty, shall not, by such location of other tribes, forfeit any of their rights or privileges guaranteed to them by this treaty.

ARTICLE XII. This treaty shall bind the contracting parties whenever the same is ratified by the Senate and President of the United States.

In witness of which, the several parties named in the foregoing treaty have hereunto set their hands and seals at the place and date above written.

J. W. PERIT HUNTINGTON, [seal.]
Supt. Indian Affairs.

WILLIAM LOGAN, [seal.]
U. S. Indian Agt.

LA-LAKE,	his x mark.	[seal.]
CHIL-O-QUE-NAS,	his x mark.	[seal.]
KELLOQUE,	his x mark.	[seal.]
MO-GHEN-KAS-KIT,	his x mark.	[seal.]
BLOW,	his x mark.	[seal.]
LE-LU,	his x mark.	[seal.]
PALMER,	his x mark.	[seal.]
JACK,	his x mark.	[seal.]
QUE-ASS,	his x mark.	[seal.]
POO-SAK-SULT,	his x mark.	[seal.]

CHE-MULT,	his x mark.	[seal.]
NO-AK-SUM,	his x mark.	[seal.]
MOOCH-KAT-ALLICK,	his x mark.	[seal.]
TOON-TUC-TEE,	his x mark.	[seal.]
BOSS-KI-YOU,	his x mark.	[seal.]
SKI-AT-TIC,	his x mark.	[seal.]
SHOL-LAL-LOOS,	his x mark.	[seal.]
TAT-TET-PAS,	his x mark.	[seal.]
MUK-HAS,	his x mark.	[seal.]
HERMAN-KUS-MAM,	his x mark.	[seal.]
JACKSON,	his x mark.	[seal.]
SCHON-CHIN,	his x mark.	[seal.]
STAK-IT-UT,	his x mark.	[seal.]
KEINT-POOS,	his x mark.	[seal.]
CHUCK-E-I-OX,	his x mark.	[seal.]
KILE-TO-AK,	his x mark.	[seal.]
SKY-TE-OCK-ET,	his x mark.	[seal.]

Signed in the presence of—
R. P. EARHART, *Secretary.*

WM. KELLY,
Capt. 1st Cav., Oregon Volunteers.

JAMES HALLORAN,
2d Lieut. 1st Inf., W. T. Vols.

WILLIAM C. McKAY, *M. D.*

ROBERT his x mark. BIDDLE.

And whereas, the said treaty having been submitted to the Senate of the United States for its constitutional action thereon, the Senate did, on the second day of July, one thousand eight hundred and sixty-six, advise and consent to the ratification of the same, with amend-

ments, by a resolution in the words and figures following, to wit:

IN EXECUTIVE SESSION, SENATE OF THE UNITED STATES,

July 2, 1866.

Resolved, (two thirds of the Senators present concurring,) That the Senate advise and consent to the ratification of the articles of agreement and convention made and concluded at Klamath lake, Oregon, on the 14th of October, 1864, by the commissioners on the part of the United States and the Klamath and Moadoc tribes and Yahooskin band of Snake Indians, with the following

AMENDMENTS:

1st. Article 1, paragraph 2, line 3, strike out the word "guaranteed," and insert in lieu thereof the word *and.*

2d. Same article, same paragraph, line 7, strike out the word "guaranteed," and insert in lieu thereof the word *reserved.*

Attest: J. W. FORNEY,
Secretary.

And whereas, the foregoing amendments having been fully explained and interpreted to the chiefs and headmen of the aforementioned Klamath and Moadoc tribes and Yahooskin band of Snake Indians, whose names are hereinafter signed, they did, on the tenth day of December, one thousand eight hundred and sixty-nine, give their free and voluntary assent to the said amendments, in the words and figures following, to wit:

Whereas the Senate of the United States, in executive session, did, on the second day of July, A.D. 1866, advise and consent to the ratification of the articles of agreement and convention made and concluded at Klamath lake, Oregon, on the 14th of October, 1864, by the commissioners on the part of the United States and the

Klamath and Moadoc tribes and the Yahooskin band of Snake Indians, with the following amendments:—

1st. Article 1, paragraph 2, line 3, strike out the word "guaranteed," and insert in lieu thereof the word *and*.

2d. Same article, same paragraph, line 7, strike out the word "guaranteed," and insert in lieu thereof the word *reserved*.

And whereas the foregoing amendments have been fully interpreted and explained to the undersigned chiefs and headmen of the aforesaid Klamath and Moadoc tribes and Yahooskin band of Snake Indians, we do hereby agree and assent to the same.

Done at Klamath Agency, Oregon, on this tenth day of December, A. D. 1869.

In witness of which, the several parties named in the said treaty have hereunto set their hands and seals, at the place and dateabove written.

A. B. MEACHAM, [seal.]
Supt. Ind. Affairs.

O. C. KNAPP, [seal.]
U. S. Ind. Agent.

ALLAN DAVIE, signed as BOSS KIYOU,	his x mark.	[seal.]
LE-LAKE,	his x mark.	[seal.]
CHIL-O-QUE-NOS,	his x mark.	[seal.]
MO-GHEN-KAK-STI,	his x mark.	[seal.]
BLOW,	his x mark.	[seal.]
LE-LU,	his x mark.	[seal.]
PALMER,	his x mark.	[seal.]
JACK,	his x mark.	[seal.]
QUE-ALL,	his x mark.	[seal.]
POO-SAK,	his x mark.	[seal.]
CHE-MULT,	his x mark.	[seal.]
NO-AK-SUM,	his x mark.	[seal.]
MOOCH-KAT-ALLICK,	his x mark.	[seal.]

TOON-TUC-TE,	his x mark.	[seal.]
SHOL-LAL-LOOS,	his x mark.	[seal.]
TAT-TET-POS,	his x mark.	[seal.]
MUK-HAS,	his x mark.	[seal.]
HERMAN-KUS-MAN,	his x mark.	[seal.]
JACKSON,	his x mark.	[seal.]
SCHON-CHIN,	his x mark.	[seal.]
KILE-TO-AK,	his x mark.	[seal.]
STAK-IT-UT,	his x mark.	[seal.]
KEINT-POOS,	his x mark.	[seal.]

Signed in the presence of—

WM. C. McKAY, *Secretary.*

J. D. APPLEGATE.

JNO. MEACHAM.

Now, therefore, be it known that I, ULYSSES S. GRANT, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in its resolution of the second of July, one thousand eight hundred and sixty-six, accept, ratify, and confirm the said treaty, with the amendments as aforesaid.

In testimony where of, I have hereto signed my name, and caused the seal of the United States to be affixed.

Done at the city of Washington this seventeenth day of February, in the year of our Lord one thous-
[seal.] and eight hundred and seventy, and of the Independence of the United States of America the ninety-fourth.

U. S. GRANT.

By the President:
HAMILTON FISH,
Secretary of State.

APPENDIX I

Pages 36 and 37 of the Transcript of proceedings in the District Court, March 12, 1973.

The second proposition is that these treaty rights cannot be taken by Congress except by a clear and specific expression in legislation. I think the Menomonee Tribe stands for that proposition as does United States vs. —

THE COURT: They didn't take the fishing rights away from these people?

MR. ISRAEL: Well, Your Honor, —

THE COURT: Actually they gave them the land. They gave them everything including the fishing rights. The people who are in the tribe can fish and hunt at their leisure without any restriction from the State of Oregon. I have so held in spite of what the State of Oregon has said. I said, "These people on the reservation don't have to get consent from the State of Oregon in order to fish and hunt. They don't need licenses. They are not restricted by seasons." I have already held that. *But that is something altogether different than saying that a man who sold all his rights can come back and insist upon rights just as the Indians who didn't sell their rights.* (emphasis added).

MR. ISRAEL: Well, Your Honor, the issue is whether, in fact, plaintiffs sold all their rights. We take the position, based on this long line of United States Supreme Court cases that their rights were not sold. They have not been compensated for them; and, as a result, their rights exist today.

THE COURT: The people who elected not to withdraw from the tribe, you say they have fishing and hunting rights, but they can't sell those rights to anyone else because of the rights of the withdrawn members. That's your point, isn't it?

* * *

MAY 1 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1575

JOHN D. CALLAHAN, ET AL., *Petitioners,*

v.

CHARLES E. KIMBALL, ET AL., *Respondents.*

MEMORANDUM OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

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OCTOBER TERM, 1973

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v.

CHARLES E. KIMBALL, ET AL., *Respondents.*

MEMORANDUM OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondents submit that Petitioners' Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit should be denied for the following reasons:

1. The opinion of the Court of Appeals for the Ninth Circuit expressly and correctly relies on important Indian law principles recently established by this Court in *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968).

2. The opinion of the Court of Appeals for the Ninth Circuit is of narrow applicability. This case is not of national importance and affects only the Klamath Indians who were subject to the Klamath Termination Act, 25 U.S.C. §§ 564-564x.

3. Petitioners' reliance on an alleged conflict between the Court of Appeals for the Ninth Circuit and the Oregon Court of Appeals (Petition, p. 4) as a reason the writ should be granted is improper. No such conflict exists because the Oregon Court of Appeals decision relied on the lower court ruling in this case which was subsequently reversed by the Court of Appeals for the Ninth Circuit. Moreover, even if there exists such a conflict, it is not between two federal courts of appeal and thus is not a proper ground for granting a writ of certiorari, under Rule 19, Rules of the Supreme Court of the United States.

4. Petitioners' undocumented allegation (Petition, p. 6) that respondents' hunting and fishing treaty rights have been sold by respondents is unsupported by the record and furthermore was rejected by the Court of Appeals for the Ninth Circuit (Petition, Appendix A, fn. 9, p. 21).

The issuance of the mandate of the Court of Appeals for the Ninth Circuit in this case has been vacated pending a determination by this Court of Petitioners' Petition for a Writ of Certiorari. As a result, respondents

request this Court to render its decision as soon as is practicable.

For the above reasons, respondents submit that the Writ of Certiorari should be denied.

Respectfully submitted,

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DANIEL H. ISRAEL
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Boulder, Colorado 80302
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Counsel for Respondents

Of Counsel:

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May 1, 1974

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1575

JOHN D. CALLAHAN, ET AL., PETITIONERS

v.

CHARLES E. KIMBALL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to the Court's order of May 28, 1974, inviting the Solicitor General to express the views of the United States in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, 13-23) is reported at 493 F. 2d 564. The opinion of the district court (Pet. App. B, 25-26) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A) was entered on February 26, 1974. The petition for a writ of certiorari was filed on April 22, 1974. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals for the Ninth Circuit was correct in holding that former members of the Klamath Indian Tribe did not lose their hunting and fishing rights by accepting a sum of money for their share of tribal property, in accordance with the Klamath Termination Act of August 13, 1954, as amended.

TREATY AND STATUTES INVOLVED

The Treaty of October 14, 1864, 16 Stat. 707, between the United States and the Klamath and other tribes is set forth at Pet. App. E, 36-45.

Section 5(a)(2) of the Klamath Termination Act of August 13, 1954, 68 Stat. 718, 719, as amended by Section 1(d) of the Act of August 14, 1957, 71 Stat. 347, 25 U.S.C. 564d(a)(2), reads in pertinent part as follows:

> SEC. 5. (a) The Secretary [of the Interior] is authorized and directed to select and retain by contract, at the earliest practicable time after the enactment of this Act and after consultation with the tribe at a general meeting called

for that purpose, the services of qualified management specialists who shall—

* * * * *

(2) immediately after the appraisal of the tribal property and approval of the appraisal by the Secretary, give to each member whose name appears on the final roll of the tribe an opportunity to elect to withdraw from the tribe and have his interest in tribal property converted into money and paid to him, or to remain in the tribe and participate in the tribal management plan to be prepared pursuant to paragraph (5) of this subsection; * * *.

Section 6(c) of the Act, 68 Stat. 720, 25 U.S.C. 564e(c), reads as follows:

Members of the tribe who receive the money value of their interests in tribal property shall thereupon cease to be members of the tribe: *Provided*, That nothing shall prevent them from sharing in the proceeds of tribal claims against the United States.

Section 14(b) of the Act, 68 Stat. 722, 25 U.S.C. 564m(b), reads as follows:

Nothing in this Act shall abrogate any fishing rights or privileges of the tribe or the members thereof enjoyed under Federal treaty.

Section 2 of the Act of August 15, 1953, Pub. L. 280, 67 Stat. 588, 589, added Section 1162(b) to Title 18, U.S.C., which reads in pertinent part as follows:

Nothing in this section * * * shall deprive any Indian or any Indian tribe, band, or com-

munity of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

STATEMENT

Respondents are former members of the Klamath Indian Tribe who, like most other tribal members, exercised their option under the Klamath Termination Act to accept a cash payment for their portion of tribal property rather than continue to hold it in indivision under a private trustee (Pet. App. A, 13-14, 17-18). In order to raise the funds necessary to pay members who so elected, a large portion of the former tribal lands were sold to the United States. Those lands are now part of the Winema National Forest and the Klamath Forest National Wildlife Refuge (Pet. App. A, 14).[1] Respondents brought this suit against game officials of the State of Oregon to declare their right to hunt and fish pursuant to the Treaty of October 14, 1864, *supra*, on publicly held lands[2] within their former reservation free of Oregon fish and game regulations. The district court

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[1] The process of termination of federal supervision over the Klamath Indians is detailed in *Crain* v. *First National Bank of Oregon, Portland*, 324 F. 2d 532 (C.A. 9), and *Klamath and Modoc Tribes* v. *United States*, 436 F. 2d 1008, certiorari denied *sub nom Anderson* v. *United States*, 404 U.S. 950.

[2] Respondents do not claim the right to hunt and fish on privately held lands on which the owners prohibit hunting and fishing (Pet. App. A, 23).

dismissed the suit for failure to state a claim upon which relief could be granted.

The court of appeals, relying primarily on this Court's decision in *Menominee Tribe* v. *United States*, 391 U.S. 404, reversed.[3] It held that the Klamath Termination Act, *supra*, like the Menominee Termination Act, 68 Stat. 250, as amended, 25 U.S.C. 891-902, passed by the same Congress, must be read *in pari materia* with the Act of August 1953 (*supra*, pp. 3-4), which, in granting to some states jurisdiction over Indians, preserved Indian hunting and fishing rights (Pet. App. A, 17-20). The court noted that, in the Klamath Act, Congress not only failed clearly to indicate an intent to abrogate treaty rights; it in fact expressly preserved at least fishing rights (Pet. App. A, 22). While recognizing that the technique of termination differed from that in *Memominee* because individual Indians could elect to receive cash payments, the court found the case nonetheless controlled by *Menominee* because, here also, there was no clear congressional intent to terminate hunting and fishing rights (Pet. App. A, 20-22). The court noted that:

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[3] In *Klamath and Modoc Tribes* v. *Maison*, 338 F. 2d 620, the court of appeals had held, prior to this Court's decision in *Menominee Tribe*, *supra*, that the Klamath Termination Act abolished all special hunting and fishing rights of members of the terminated tribes. In reversing the district court here, the court of appeals noted that its reasoning in that prior case could not stand in light of this Court's decision in *Menominee Tribe*.

> Indeed, the reasoning [of] *Menominee Tribe* may be even more compelling in this case. At the hearings on the Klamath Termination bill, Senator Watkins suggested that the Government "buy out" the Indians' hunting and fishing rights rather than preserve them after termination. See Joint Hearings, Subcommittees of the Committees on Interior and Insular Affairs, 83d Cong., 2d Sess., Pt. 4, on S. 2745 and H.R. 7320, pp. 254-55. Congress did not heed this suggestion, however. * * * [Pet. App. A, 21 n. 9.]

The court of appeals consequently held that the respondents may exercise their treaty hunting, trapping, and fishing rights free of state game and fish regulations on publicly held lands within the boundaries of their former reservation and on privately held lands within those boundaries where hunting and fishing is permitted (Pet. App. A, 23).*

DISCUSSION

The decision is correct and does not conflict with any decision of this Court or any other court of appeals. Moreover, it does not present an issue of general importance requiring review by this Court.

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* This right, like all non-exclusive treaty hunting and fishing rights, would presumably be subject to state or federal regulation shown to be necessary for conservation of the fish or game in question or the safety of others. The court of appeals, like this Court in *Menominee*, did not reach the question of permissible regulation solely in the interest of conservation.

1. The court of appeals, in a careful opinion, with attention to the differences as well as the similarities between this case and *Menominee Tribe*, sought to apply the teachings of the Court in *Menominee* to the facts of this case. Petitioners' only real claim is that *Menominee* is inapplicable because the respondents here are Indians who, pursuant to the Klamath Termination Act, chose to "withdraw" from the terminated Klamath Tribe by "receiv[ing] the money value of their interests in tribal property * * *" [25 U.S.C. 564d(a), 564e(c)], rather than be subject to a private trustee. But, as the court of appeals held, the reasoning of *Menominee* renders this factual difference immaterial because the Klamath Termination Act does not evidence any congressional intent—much less a *clear* intent—to terminate the hunting and fishing rights secured by the Treaty of 1864 as to those beneficiaries who elected to receive payment for their share of the tribal lands. To hold that "withdrawing" members lost their hunting and fishing rights would contravene the principle upon which *Menominee* was founded: that Treaty rights cannot be abrogated by implication.

Petitioners' contention, moreover, is inconsistent with the legislative history of the Klamath Termination Act. As the Court of Appeals pointed out, Senator Watkins, the principal congressional architect of the termination statutes, suggested at the hearings on the Klamath Termination bill that the United States "buy out" the hunting and fishing rights of the members of the Klamath and Modoc

Tribes rather than preserve them after termination. See, Joint Hearings before the Subcommittees of the Committees on Interior and Insular Affairs, on S. 2745 and H.R. 7320, Indians: Termination of Federal Supervision over Certain Tribes of Indians, 83d Cong., 2d Sess., Pt. 4, pp. 254-255. This suggestion was not adopted by Congress, however.[5]

2. At all events, the case does not call for review by this Court. The decision below in no way conflicts with any decision of this Court; indeed, petitioners' complaint is really that the court of appeals followed *Menominee*. To be sure, the ruling here is inconsistent with a decision of an intermediate Oregon state court, *State* v. *Bojorcas*, 14 Ore. App. 538, 513 P.2d 813 (Ore. App.), rehearing denied, 514 P.2d 566. But that disagreement need not be resolved by this Court: presumably, Oregon will

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[5] Indeed, the Klamath Termination Act specifically provides that "[n]othing [in the Act] shall abrogate any fishing rights or privileges of the tribes or the members thereof enjoyed under Federal treaty." 25 U.S.C. 564m(b). It might be argued that the express reference to fishing rights precludes an intent to preserve hunting rights. Such a conclusion, however, would be improper as the Act merely tracks the language of the Treaty of 1864 and evidences an intent to preserve such special rights as were provided by that Treaty. See Joint Hearings, *supra*, at pp. 253-255. Post Termination Act judicial decisions have made clear that the Indians' hunting and trapping rights, as well as fishing rights, were preserved by the treaty. See, in addition to the decision below, *Klamath and Modoc Tribes* v. *Maison*, 139 F. Supp. 634 (D. Ore.). That ruling is of course consistent with this Court's holding in *Menominee*, also decided after the Termination Act, that hunting rights are inherent in Indian title.

abide by the holding of the United States Court of Appeals with respect to this federal question.[6]

No other consideration justifies further review by this Court. The question presented is of narrow applicability. All that is involved is the correct application of *Menominee Tribe* to the slightly different and unique situation presented by the Klamath Termination Act. No other case is likely to be controlled by this decision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

WALLACE H. JOHNSON,
Assistant Attorney General.

LOUIS F. CLAIBORNE,
HARRY R. SACHSE,
Assistants to the Solicitor General.

OCTOBER 1974.

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[6] The circumstances that persuaded the Court to review the *Menominee* case were quite different. There, the highest State court was in direct conflict with the Court of Claims, which could issue no judgment binding on State officials. Moreover, this Court had not then spoken on the question.

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